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In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA, PETITIONER

v.

ONE ASSORTMENT OF 89 FIREARMS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether a prior acquittal on criminal charges involving firearms precludes a subsequent in rem forfeiture proceeding against the firearms.

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The Solicitor General, on behalf of the United States, petitions for a writ or certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The en banc opinion of the court of appeals (App. A, *infra*, 1a-14a) is reported at 685 F.2d 913. The earlier panel opinion (App. B, *infra*, 15a-29a) is reported at 669 F.2d 206. The opinion of the district court (App. D, *infra*, 31a-44a) is reported at 511 F. Supp. 133. An earlier opinion of the district court (App. E, *infra*, 45a-55a) is reported at 463 F. Supp. 365.

JURISDICTION

The judgment of the court of appeals (App. C, *infra*, 30a) was entered on August 23, 1982. On November 12, 1982, the Chief Justice extended the time in which to file a petition for a writ of certiorari to and including December 21, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 924(d) of Title 18 provides:

> Any firearms or ammunition involved in or used or intended to be used in, any violation of the provisions of this chapter or any rule or regulation promulgated thereunder, or any violation of any other criminal law of the United States, shall be subject to seizure and forfeiture and all provisions of the Internal Revenue Code of 1954 relating to the seizure, forfeiture, and disposition of firearms, as defined in section 5845(a) of that Code, shall, so far as applicable, extend to seizures and forfeitures under the provisions of this chapter.

STATEMENT

1. On March 31, 1977, the United States commenced an in rem civil action in the United States District Court for the District of South Carolina seeking forfeiture to the United States of an assortment of firearms seized on January 20, 1977, by Special Agents of the Bureau of Alcohol, Tobacco and Firearms. The complaint alleged that the firearms had been used and possessed on January 20, 1977, and prior thereto by Patrick M. Mulcahey while he was engaged in the business of dealing in firearms without a license, in violation of 18 U.S.C.

922(a)(1) and 923(a). Forfeiture was sought pursuant to 18 U.S.C. 924(d).[1]

Mulcahey filed a claim for recovery of the firearms and also filed an answer to the forfeiture complaint. In his answer, Mulcahey raised collateral estoppel and res judicata as a bar to the forfeiture. Mulcahey had previously been tried and acquitted of charges that he had been engaged in the business of dealing in firearms without being licensed, in violation of 18 U.S.C. 922(a)(1) and 924(a). *United States* v. *Mulcahey*, No. 77-00013 (D.S.C. Mar. 16, 1977) (App. A, *infra*, 2a). At the criminal trial, the government's evidence showed that Mulcahey had not been issued a license to deal in firearms for the period of July 1, 1975, to March 31, 1977, but that he nevertheless bought and sold firearms on numerous occasions during this period (App. D, *infra*, 33a-35a). Mulcahey testified in his own defense, admitting that he had no license (Tr. 247)[2] and that he had bought and sold firearms during the period set forth in the indictment (Tr. 247-279). He claimed, however, that he had been entrapped into making the illegal firearms transactions (see, e.g., Tr. 248-249, 257-263, 273). The trial court thereafter submitted the entrapment defense to the jury (Tr. 294-296). The jury returned a general verdict of not guilty.

On motion of the government in the forfeiture proceeding, the district court struck Mulcahey's col-

[1] The number of firearms involved in this action has varied somewhat with time. See App. E, *infra*, 45a. The original complaint listed an assortment of 92 firearms but was subsequently amended to include an additional automatic pistol, bringing the total to 93. Four of these guns were returned to Mulcahey's wife, leaving 89 guns as the subject of the forfeiture proceeding (App. D, *infra*, 36a).

[2] "Tr." refers to the transcript of the criminal trial.

lateral estoppel and res judicata defenses (App. E, *infra*, 45a-51a). The parties had previously stipulated that the transcript of the prior criminal trial would be submitted to the court in lieu of live testimony (App. A, *infra*, 2a). In its findings of fact, the court found that Mulcahey had no federal firearms dealer's license and that he did indeed sell and purchase numerous firearms and ammunition, including multiple purchases on several occasions of the same type of firearms (App. D, *infra*, 33a, 39a). The court held that a forfeiture proceeding under 18 U.S.C. 924(d) is remedial in nature and is properly characterized as a civil proceeding (App. D, *infra*, 37a). The court concluded that the government had proved by a preponderance of the evidence that Mulcahey was engaged in the business of dealing in firearms and ammunition without the required federal license (*ibid.*). The firearms used or intended to be used in violation of 18 U.S.C. 922(a)(1) were therefore found to be subject to forfeiture under 18 U.S.C. 924(d) (App. D, *infra*, 37a-44a).[3]

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[3] The court concluded (App. D, *infra*, 42a-43a):

> In the instant case, although the claimant did not display his entire assortment of firearms, he did maintain them all in his residence, from which he also operated an army surplus business. The fact that the claimant kept the entire assortment of firearms so accessible to his surplus showroom, that he repeatedly went into the non-public area of his residence to obtain the firearms he did display to the government agents, the claimant's own statements, his course of dealing, and the wealth of circumstantial evidence in the record prove by a preponderance of the evidence that he used or intended to use all of the firearms he personally possessed as an inventory to be drawn from in the course of dealing in firearms, in violation of 18 U.S.C. § 922(a)(1).

2. A divided panel of the court of appeals reversed (App. B, *infra*, 15a-29a). Relying on *Coffey* v. *United States*, 116 U.S. 436 (1886), the panel held that the forfeiture action was barred by Mulcahey's criminal acquittal because the criminal action involved "the identical facts" of the forfeiture proceeding and the "essential elements" of the forfeiture action had therefore been resolved against the government (App. B, *infra*, 22a).

Chief Judge Winter dissented (App. B, *infra*, 23a-29a). He concluded (*id.* at 23a) that while "*Coffey* holds that a subsequent *criminal* forfeiture is barred by an earlier acquittal on criminal charges arising out of the same facts," more recent Supreme Court decisions "compel the conclusion that the forfeiture in the present case is civil." A subsequent civil action, Judge Winter reasoned, is not barred by a criminal acquittal "because the standards of proof in criminal and civil proceedings are different" (*ibid.*). Relying on *Helvering* v. *Mitchell*, 303 U.S 391 (1938), *Murphy* v. *United States*, 272 U.S. 630 (1926), and *Stone* v. *United States*, 167 U.S. 178 (1897), Judge Winter concluded that "if the forfeiture proceeding is civil in nature," res judicata does not bar the civil action, and "the standard of proof argument, by itself, is enough to defeat any resort to collateral estoppel" (App. B, *infra*, 24a). Judge Winter noted that the rationale adopted by the majority was rejected in *One Lot Emerald Cut Stones* v. *United States*, 409 U.S. 232 (1972), because the forfeiture provision at issue in that case was found to be civil in nature. He contended that similar reasoning controlled in this case. "The forfeiture statute here, 18 U.S.C. § 924(d), was manifestly designed to aid in the enforcement of gun

control laws by preventing the circulation of firearms which had been illegally obtained. *One Lot* thus compels the conclusion that the forfeiture at issue here is civil in nature, so that the double jeopardy and res judicata claims must be rejected. It matters not, despite the majority's views, that the necessary allegations in the criminal proceeding and the forfeiture proceeding were identical" (App. B, *infra*, at 27a, footnote omitted).

3. On rehearing en banc the court of appeals adhered to the panel decision by a 5-4 vote (App. A, *infra*, 1a-4a). The majority again specifically relied on *Coffey* v. *United States*, *supra*, and rejected the government's argument that a prior criminal acquittal does not bar a subsequent forfeiture proceeding (App. A, *infra*, 3a-5a). It concluded that the sanction at issue here is criminal in nature, relying on the fact that the forfeiture provision is contained in 18 U.S.C. (& Supp. IV) 924 and "[e]verything in § 924 provides a penalty, be it fine, prison or forfeiture, for the violation of a provision of the Gun Control Act" (App. A, *infra*, 9a-10a). The court distinguished *Helvering* v. *Mitchell*, *supra*, and other Supreme Court precedent providing for civil penalties subsequent to a criminal acquittal on the ground that "[t]here is nothing remedial about forfeiture under § 924(d)" (App. A, *infra*, 10a).

Judge Winter, joined by three others, again dissented. Relying in part on the reasoning of his dissent at the panel stage, he further noted that the "majority errs when it confidently asserts that the jury verdict in the criminal action conclusively settled the issue that Mulcahey was not engaged in the business of dealing in firearms without a license" (App. A, *infra*, 13a). Because of Mulcahey's asser-

tion of entrapment, "it is equally possible that the jury found that Mulcahey was engaged in the business of dealing in firearms without a license, but had been entrapped into committing an illegal sale, as [that it] found that Mulcahey was not so engaged" (*ibid.*). Judge Winter also remained convinced "that the forfeiture provisions of 18 U.S.C. 924(d) are civil in nature so that *any* determination in the criminal prosecution is irrelevant to a decision of forfeiture" (App. A, *infra*, 13a; emphasis in original). This conclusion is reinforced, Judge Winter reasoned, by the fact that the forfeiture provision is significantly broader in scope than the criminal sanctions (*id.* at 13a-14a). The forfeiture provision provides "disjunctively that '[a]ny firearm involved in or used or *intended to be used* in, any violation of this chapter * * * shall be subject to seizure and forfeiture * * *' (emphasis added). [18 U.S.C. 924(d)]. Nothing in the provision of § 922 under which Mulcahey was prosecuted renders an *intention* to engage in the business of dealing in firearms without a license illegal" (App. A, *infra*, 13a-14a; footnote omitted).

REASONS FOR GRANTING THE PETITION

Section 924(d) of Title 18 of the United States Code provides for the seizure and forfeiture of "[a]ny firearm or ammunition involved in or used or intended to be used in, any violation of [federal gun control law]." Relying solely on *Coffey* v. *United States*, 116 U.S. 436 (1886), the court of appeals ruled that an acquittal on criminal charges bars a subsequent forfeiture action under 18 U.S.C. 924(d), notwithstanding the fact that forfeiture actions under Section 924(d) have traditionally been subject to the preponderance of evidence standard of

proof rather than the much stricter criminal standard. Although the doctrinal basis for its preclusion rule is unclear, the lower court's decision rests on the premise that "[t]he criminal verdict conclusively decided that the firearms * * * were not 'involved in or used or intended to be used in the violation'" of federal law (App. A, *infra*, 8a). This factual resolution, the court concluded, is binding on all subsequent judicial proceedings involving the firearms and bars the forfeiture action here.

The premise and conclusion of the court of appeals conflict with controlling legal precedent and are faulty as a matter of logic. An acquittal, of course, establishes only that the government has not shown beyond a reasonable doubt that certain facts exist; it does not "conclusively" establish that those facts do not exist. The decisions of this Court, therefore, clearly hold that a criminal acquittal does not bar a subsequent "civil action requiring a different degree of proof." *Helvering* v. *Mitchell*, 303 U.S. 391, 405 (1938). The court of appeals, in apparent recognition of this rule, concluded that a forfeiture under 18 U.S.C. 924(d) is neither "civil" (App. A, *infra*, 12a) nor "remedial" (*id.* at 10a). This conclusion, however, conflicts with the decisions of numerous other circuits that have held that 18 U.S.C. 924(d) embodies a remedial, civil penalty. See, e.g., *Glup* v. *United States*, 523 F.2d 557, 561 (8th Cir. 1975).

The en banc decision of the court of appeals raises issues that merit the attention of this Court. The lower court has disregarded controlling decisions of this Court and, by attaching a "criminal" label to this forfeiture action, has rendered an opinion in direct conflict with every other court of appeals that

has addressed the question whether 18 U.S.C. 924(d) embodies a civil or a criminal sanction.

1. The decision of the en banc court below rests squarely upon a single aged precedent—*Coffey* v. *United States*, *supra*. *Coffey*, however, is a slender reed upon which to hang the entire weight of this decision. Indeed, more recent opinions of this Court raise the question whether the "rule" of the *Coffey* case retains any independent vitality.

The Court in *Coffey* held that a forfeiture action brought against certain distilling equipment was barred by the owner's prior acquittal on charges of removing and concealing distilled spirits with the intent to defraud the revenue.[4] The Court reasoned that "where an issue raised as to the existence of the act or fact denounced has been tried in a criminal proceeding, instituted by the United States, and a judgment of acquittal has been rendered in favor of a particular person, that judgment is conclusive in favor of such person, on subsequent trial of a suit *in rem* by the United States, where, as against him, the existence of the same act or fact is the matter in issue, as a cause for the forfeiture of the property prosecuted in such suit *in rem*" (116 U.S. at 443). The Court noted and rejected the argument that the criminal acquittal should not bar the in rem action because the acquittal "may have taken place because of the rule requiring guilt to be proved beyond a reasonable doubt, and that, on the same evidence, on the question of preponderance of proof, there might be a

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[4] The statute at issue in *Coffey* provided that whenever any person engaged in the distilling business "defrauds * * * the United States of the tax on the spirits distilled by him * * * he shall forfeit the distillery and distilling apparatus * * * and shall be fined * * * and be imprisoned" (116 U.S. at 437).

verdict for the United States * * *" (*ibid.*). The Court concluded that differing standards of proof between a criminal and a forfeiture action do not prevent preclusion because "the fact or act has been put in issue and determined against the United States; and all that is imposed by the statute, as a consequence of guilt, is a punishment therefor. There could be no new trial of the criminal prosecution after the acquittal in it; and a subsequent trial of the civil suit amounts to substantially the same thing, with a difference only in the consequences following a judgment adverse to the claimant" (*ibid.*).

The *Coffey* decision has remained something of an enigma, because the Court did not specify the legal foundation for the preclusion rule announced by the case. Was the forfeiture action barred by res judicata? Collateral estoppel? Double jeopardy? Subsequent courts and commentators have been uncertain. See generally 1B J. Moore & T. Currier, *Moore's Federal Practice* ¶ 418[3] (2d ed. 1982). See also *United States* v. *One Dodge Sedan*, 113 F.2d 552 (3d Cir. 1940) (collecting cases and law review articles criticizing *Coffey*). Whatever the original foundation for the *Coffey* rule, however, later decisions of this Court have given it an extremely narrow scope. See *Helvering* v. *Mitchell*, 303 U.S. 391, 405-406 (1938); *Murphy* v. *United States*, 272 U.S. 630, 631-632 (1926); *Stone* v. *United States*, 167 U.S. 178, 186-187 (1897).

In *Helvering*, the Court was faced with an action to recover a substantial monetary penalty for fraudulent avoidance of income tax. The defendant argued that his prior acquittal on charges of willfully attempting to evade and defeat the tax precluded the subsequent penalty action. The court of appeals, relying principally on *Coffey*, agreed and held that the

penalty action was precluded (see 303 U.S. at 396). The Court, in an opinion by Justice Brandeis, reversed.

The defendant in *Helvering* advanced three basic arguments: (1) that the second penalty action was barred by "res judicata" (apparently used in a broad sense as including collateral estoppel, see 303 U.S. at 397); (2) that the penalty action was barred by the Double Jeopardy Clause (*id.* at 398); and (3) that the *Coffey* decision required preclusion (*id.* at 405). The Court rejected each argument.

The res judicata and collateral estoppel arguments were quickly dispatched by the *Helvering* Court. The Court simply reversed the position taken in *Coffey* and concluded that differences between the burden of proof in criminal and civil actions do prevent application of res judicata or collateral estoppel to civil suits brought after a criminal acquittal. Compare 116 U.S. at 443 with 303 U.S. at 397. See also *United States* v. *$2,500 in United States Currency*, 689 F.2d 10, 15 (2d Cir. 1982) (*Helvering* "reject[s] the holding of *Coffey*"). "The difference in degree of the burden of proof in criminal and civil cases precludes application of the doctrine of *res judicata*. The acquittal was 'merely * * * an adjudication that the proof was not sufficient to overcome all reasonable doubt of the guilt of the accused.' * * * That acquittal on a criminal charge is not a bar to a civil action by the Government, remedial in its nature, arising out of the same facts on which the criminal proceeding was based has long been settled." *Helvering* v. *Mitchell*, *supra*, 303 U.S. at 397. See also *One Lot Emerald Cut Stones* v. *United States*, 409 U.S. 232, 235 (1972) ("difference[s] in the burden of proof in criminal and civil cases precludes application of the doctrine of collateral estoppel"); *Murphy* v. *United States*, *supra*, 272

U.S. at 632-633; *Stone* v. *United States*, *supra*, 167 U.S. at 188.

The *Helvering* Court similarly rejected the defendant's double jeopardy argument on the ground that the second penalty action was civil, not criminal in nature. "Congress may impose both a criminal and a civil sanction in respect to the same act or omission * * *. The question for decision is thus whether [the second action] imposes a criminal sanction." 303 U.S. at 399. The Court held that "[f]orfeiture of goods or their value or the payment of fixed or variable sums of money" are civil sanctions because they have historically been "enforcible by civil proceedings" (*id.* at 400).

Finally, the Court rejected the notion that *Coffey* mandated preclusion of the second suit. The Court stated flatly that "the rule of the *Coffey* case '[does] not apply to a situation where there ha[s] been an acquittal on a criminal charge followed by a civil action requiring a different degree of proof' " (303 U.S. at 405). Therefore, as Judge Winter correctly noted in his original dissent to the panel opinion, *Coffey* bars only a "subsequent criminal forfeiture * * * arising out of the same facts" as an earlier criminal acquittal (App. B, *infra*, 23a). This is the sole aspect of the *Coffey* decision that has any continuing vitality today. One need not, moreover, reach as far back as *Coffey* for an expression of this rule. See, e.g., *Ashe* v. *Swenson*, 397 U.S. 436, 445-447 (1970). Thus, the crucial question in this case is not, as the court of appeals apparently believed, whether *Coffey* mandates preclusion, but rather whether 18 U.S.C. 924(d) provides a civil or criminal penalty. The court of appeals erred in concluding that 18 U.S.C. 924(d) embodies a criminal sanction.

2. The lower court's ruling that 18 U.S.C. 924(d) provides a criminal sanction does not comport with this Court's decision in *United States* v. *Ward*, 448 U.S. 242 (1980), nor with the teachings of *Helvering* v. *Mitchell*, *supra*, and *One Lot Emerald Cut Stones* v. *United States*, *supra*. Those decisions persuasively demonstrate that a forfeiture action under 18 U.S.C. 924(d) is not precluded by a prior criminal acquittal because the statute provides a penalty that is civil and remedial in nature.

Based on two rather limited considerations, the court below concluded that 18 U.S.C. 924(d) is neither "civil" nor "remedial." The court reasoned that 18 U.S.C. 924(d) is not "civil" because it "is a part of the 'Penalties' section of the law" (App. A, *infra*, 9a). It next concluded that there is nothing "remedial" about the statute because following forfeiture the "firearms are destroyed" (*id.* at 10a). See 26 U.S.C. 5872(b). This perfunctory analysis is plainly insufficient. The fact that forfeiture is listed as a "penalty" is not, of course, determinative of whether it is a civil or a criminal penalty. Moreover, the fact that forfeited firearms are destroyed rather than resold does not negate the remedial congressional purpose behind the forfeiture itself. A more balanced and careful analysis leads to a result directly opposite to the one reached by the court of appeals.

"This Court has often stated that the question whether a particular statutorily-defined penalty is civil or criminal is a matter of statutory construction." *United States* v. *Ward*, *supra*, 448 U.S. at 248. See also *One Lot Emerald Cut Stones*, *supra*, 409 U.S. at 237; *Helvering*, *supra*, 303 U.S. at 399. The Court's inquiry in this regard has "traditionally proceeded on two levels." *United States* v. *Ward*, *supra*, 448 U.S. at 248. First, the Court has sought to

determine whether Congress "indicated either expressly or impliedly a preference for one label or the other" (*ibid.*). Second, where Congress has indicated its intention to establish a civil penalty, the Court has inquired "whether the statutory scheme was so punitive either in purpose or effect as to negate that intention" (*id.* at 249). This analysis clearly indicates the civil nature of the forfeiture provision at issue here.

Section 924(d) does not prescribe the procedures to be followed in effectuating a forfeiture, but rather incorporates by reference the procedures of the Internal Revenue Code. This fact alone strongly indicates Congress' intention to establish Section 924(d) as a civil rather than a criminal penalty. Forfeitures "have been recognized as enforcible by civil proceedings since the original revenue law of 1789." *Helvering*, 303 U.S. at 400. The Internal Revenue Code provides that proceedings to enforce forfeitures "shall be in the nature of a proceeding in rem in the United States District Court for the district where such seizure is made" (26 U.S.C. 7323). In rem actions are, by their very nature, civil proceedings, with jurisdiction dependent upon seizures of a physical object, in contrast to the in personam nature of criminal actions. See *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 684 (1974). In addition to the in rem nature of the action, the Internal Revenue Code provides a summary, administrative proceeding for forfeiture of seized goods valued at $2,500 or less. See 26 U.S.C. 7325 (requiring the filing of a claim and posting of a bond in order to obtain judicial proceedings regarding forfeiture of goods valued at less than $2,500). Notice of the seizure may also be provided by publication. 26 U.S.C. (& Supp. IV) 6325.

Such procedures plainly could not be utilized in a criminal action.[5] "That Congress provided a distinctly civil procedure for [forfeitures under 18 U.S.C. 924(d)] indicates clearly that it intended a civil, not a criminal sanction." *Helvering, supra*, 303 U.S. at 402.

The fact that civil rather than criminal procedures apply to a Section 924(d) forfeiture is not the only evidence that the sanction cannot be deemed a criminal penalty. The legislative intent behind Section 924(d) demonstrates a broadly remedial purpose for the sanction. The forfeiture provided by Section 924(d) is not merely punitive; it is designed to prevent the circulation of firearms that have been illegally obtained. As the Second Circuit stated, the statute is designed "to keep potentially dangerous weapons out of the hands of unlicensed dealers." *United States* v. *16,179 Moslo Italian .22 Caliber Winlee Derringer Convertible Starter Guns*, 443 F.2d 463, 466 (2d Cir.), cert. denied, 404 U.S. 983

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[5] In line with the civil procedural rules governing forfeitures under 18 U.S.C. 924(d), courts have concluded that the government need establish its case only by a preponderance of the evidence. *United States* v. *86 Firearms*, 623 F.2d 643, 644 (10th Cir. 1980). One district court has even concluded that once the government has shown probable cause to justify a forfeiture, the burden of proof shifts to the defendant. *United States* v. *26 Firearms*, 485 F. Supp. 549 (W.D. Pa. 1980), aff'd, 639 F.2d 777 (3d Cir. 1980). Courts have regularly granted summary judgment in favor of the government (e.g., *United States* v. *Various Firearms*, 523 F.2d 47, 48 (7th Cir. 1975)) and routinely permit the government to appeal from an adverse decision in a forfeiture case—something that would be impermissible if the forfeiture action were "criminal." See, e.g., *United States* v. *Walters*, 638 F.2d 947 (6th Cir. 1981); *United States* v. *Seven Firearms*, 632 F.2d 1276 (5th Cir. 1980).

(1971).[6] See also *Lewis* v. *United States*, 445 U.S. 55, 66 (1980). And, as noted by Judge Winter in dissent (App. A, *infra*, 14a), the scope of Section 924(d) is much broader than the criminal provisions of 18 U.S.C. 922(a)(1). Section 922(a)(1) outlaws only the completed act of engaging in the business of dealing in firearms without a license. The forfeiture sanction, by contrast, reaches firearms that are merely "intended to be used" in violation of the law. Section 924(d), therefore, is clearly a remedial sanction, broader in scope than the separate criminal provisions of the gun control act, included by Congress as an integral part of a "carefully constructed package of gun control legislation." *Scarborough* v. *United States*, 431 U.S. 563, 570 (1977); *United States* v. *Batchelder*, 442 U.S. 114, 120 (1979).

The procedures prescribed by Congress for executing the forfeiture and the congressional purpose behind the sanction all evidence Congress' intent that 18 U.S.C. 924(d) be classified as a civil rather than a criminal penalty. The sanction, moreover, is not "so punitive either in purpose or effect as to negate that intention" (*United States* v. *Ward*, *supra*, 448 U.S. at 249). We recognize that a forfeiture proceeding is frequently labeled quasi-criminal because its object, like that of a criminal prosecution, is to penalize through the civil process the commission of an offense against the law. *One 1958 Plymouth Sedan* v. *Pennsylvania*, 380 U.S. 693, 700 (1965), citing *Boyd* v. *United States*, 116 U.S. 616, 633-634 (1886). But, as this Court recently explained, a forfeiture

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[6] Thus, rather than evidencing a punitive intent, as the court below apparently concluded (App. A, *infra*, 10a), the fact that forfeited firearms are destroyed furthers the broad remedial purposes of federal gun control legislation. See 26 U.S.C. 5872(b).

proceeding is not " 'so far criminal in [its] nature' " as to engage all the "procedural guarantees normally associated with criminal prosecutions" (*United States* v. *Ward*, *supra*, 448 U.S. at 251-255, quoting *Hepner* v. *United States*, 213 U.S. 103, 112 (1909)). The sanction in this case is no more criminal than the forfeiture at issue in *One Lot Emerald Cut Stones* (see 409 U.S. at 232) or the stiff monetary penalty involved in *Helvering* (see 303 U.S. at 400). The court below therefore erred in applying the preclusion rule announced in *Coffey*, inasmuch as that rule has no application except to criminal sanctions sought after a criminal acquittal. *Helvering*, *supra*, 303 U.S. at 405; *Ashe* v. *Swenson*, *supra*, 397 U.S. at 445-447.[7]

3. The decision below not only disregards controlling Supreme Court precedent, it also conflicts with the conclusion of six other circuits that 18 U.S.C. 924(d) embodies a civil sanction. *United States* v. *16,175 Moslo Italian .22 Caliber Winlee Derringer Convertible Starter Guns*, *supra*, 443 F.2d at 466; *United States* v. *Seven Firearms*, 632 F.2d 1276, 1278 (5th Cir. 1980); *United States* v. *Walters*, *supra*, 638 F.2d at 950; *United States* v. *Various Firearms*, 523 F.2d 47, 48 (7th Cir. 1975); *Glup* v. *United States*, *supra*, 523 F.2d at 561; *United States* v. *86 Firearms*, 623 F.2d 643, 644 (10th Cir. 1980). As the Eighth Circuit stated in *Glup*: "It is well established that a forfeiture proceeding under 18 U.S.C. 924(d) is remedial in nature and is properly

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[7] While the court below did not purport to rest its decision on double jeopardy grounds, we note that this Court has held that a forfeiture action may be brought following a criminal conviction, indicating that double jeopardy concerns are not the foundation for the *Coffey* rule. See *Various Items of Personal Property* v. *United States*, 282 U.S. 577 (1931). See also *United States* v. *Ward*, *supra*, 448 U.S. at 253.

characterized as a civil proceeding" (523 F.2d at 561). Thus, that court concluded that a forfeiture action under Section 924(d) would not be barred by a prior criminal acquittal (523 F.2d at 561). At least one district court has likewise held that a forfeiture under 18 U.S.C. 924(d) may follow an acquittal on related criminal gun control charges. *United States* v. *One Assortment of 12 Rifles and 21 Handguns*, 313 F. Supp. 641, 642 (N.D. Fla. 1970).

The decision of the court of appeals necessarily rests on the erroneous conclusion that an ostensibly civil forfeiture penalty is in reality a criminal sanction. Forfeitures, however, have long been recognized by this Court as enforcible by civil proceedings. "In spite of their comparative severity, such sanctions have been upheld against the contention that they are essentially criminal and subject to the procedural rules governing criminal prosecutions." *Helvering*, *supra*, 303 U.S. at 400. See also *United States* v. *Regan*, 232 U.S. 37 (1914) (tracing the civil nature of forfeitures back to the earliest days of this country). Review by this Court is warranted in order to preserve the clarity that this area of the law requires.[8]

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[8] Unless the error of the lower court is corrected, litigants in the Fourth Circuit and elsewhere will be unsure as to whether civil procedures still control forfeiture actions under 18 U.S.C. 924(d). See generally note 5, *supra*. Absent clarification by this Court, even *convicted* defendants may assert that a forfeiture action following conviction is barred by double jeopardy considerations. But see *Various Items of Personal Property* v. *United States*, 282 U.S. 577 (1931) (permitting forfeiture action following criminal conviction). It is even possible that the rationale of the court of appeals' decision would require application of the Federal Rules of

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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DECEMBER 1982

Criminal Procedure to all forfeiture proceedings based on a violation of federal criminal law. See, e.g., Fed. R. Crim. P. 7(c)(2), 31(e), 32(b)(2) (specifying procedural requirements for "criminal" forfeitures).

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 81-1055

UNITED STATES OF AMERICA, APPELLEE

v.

ONE ASSORTMENT OF FIREARMS, APPELLANT

NATIONAL RIFLE ASSOCIATION OF AMERICA,
AMICUS CURIAE

Appeal from the United States District Court
for the District of South Carolina, at Columbia
Charles E. Simons, Jr., District Judge

Argued: June 8, 1982 Decided: August 23, 1982

Before WINTER, Chief Judge, BUTZNER, RUSSELL, HALL, PHILLIPS, MURNAGHAN, SPROUSE, ERVIN and CHAPMAN, Circuit Judges, sitting en banc.

CHAPMAN, Circuit Judge

This is an appeal from a judgment ordering forfeiture under 18 U.S.C. § 924(d) of 80 firearms seized from the home of Patrick Mulcahey, who was alleged to have been a dealer in firearms without a license. Mulcahey had previously been indicted for

unlawfully and knowingly engaging in the business of dealing in firearms without a license in violation of 18 U.S.C. § 922(a)(1). Finding that Mulcahey's acquittal on the criminal charge is a bar to the forfeiture, we reverse.

On January 20, 1977, an assortment[1] of firearms was seized by agents of the Bureau of Alcohol, Tobacco and Firearms. Following an indictment under 18 U.S.C. § 922(a)(1), Mulcahey was tried by a jury and on March 16, 1977 was acquitted of the charge. The present action *in rem* against the same assortment of firearms was initiated on March 31, 1977 by service of a complaint seeking forfeiture pursuant to 18 U.S.C. § 924(d). Mulcahey, as claimant, filed a claim for recovery of the firearms and also filed an answer to the complaint. The parties entered into a stipulation that the transcript in the criminal trial of *United States* v. *Mulcahey*, No. 77-00013, would be submitted to the court in lieu of testimony. Upon motion of the United States prior to trial, the district court struck Mulcahey's second defense of collateral estoppel, res judicata and the bar to the present proceedings of the jury verdict in No. 77-00013. Upon trial of the forfeiture the same firearms which had been seized by the ATF and used by the United States Attorney as evidence in the criminal action were again introduced into evidence. The district court ordered a forfeiture of 80 of the firearms. The court concluded:

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[1] The number of firearms in the assortment has varied from time to time as the agents of ATF and the United States returned certain firearms admittedly belonging to other persons and the district court in its final order directed that certain firearms be returned to owners other than Mulcahey.

> . . . [T]he firearms here in question were involved in, used and intended to be used in violation of 18 U.S.C. § 922(a)(1). Such firearms are rendered subject to forfeiture under 18 U.S.C. § 924(d), which forfeiture is hereby ordered.

The court found that these firearms were used by Mulcahey from May 13, 1976 to January 20, 1977, while Mulcahey was engaged in the business of dealing in firearms without being properly licensed. The criminal indictment against Mulcahey charged him with being engaged in the business of dealing in firearms without being licensed to do so from on or about May 12, 1976, up to the return of the indictment on January 19, 1977.

Mulcahey seeks return of the firearms upon the ground that the jury verdict in the criminal action conclusively settled the issue that he was not engaged in the business of dealing in firearms without a license, and he contends that the present action is barred by the holding in *Coffey* v. *United States*, 116 U.S. 436 (1886). We agree.

Coffey was tried on a criminal charge of violating the revenue laws of the United States by operating a distillery without payment of the required taxes. He was acquitted on this charge, and shortly thereafter the United States sought forfeiture of the distilling equipment. Coffey raised the prior acquittal as a bar to the forfeiture action, and the Supreme Court agreed, stating at page 442:

> The principal question is as to the effect of the indictment, trial, verdict and judgment of acquittal set up in the fourth paragraph of the answer. The information is founded on sections 3257, 3450 and 3453; and there is no question,

on the averments in the answer, that the fraudulent acts and attempts and intents to defraud, alleged in the prior criminal information, and covered by the verdict and judgment of acquittal, embraced all of the facts, attempts and intents averred in the information in this suit.

The question, therefore, is distinctly presented, whether such judgment of acquittal is a bar to this suit. We are of the opinion that it is.

At 443 the Court stated:

Yet, where an issue raised as to the existence of the act or fact denounced has been tried in a criminal proceeding, instituted by the United States, and a judgment of acquittal has been rendered in favor of a particular person, that judgment is conclusive in favor of such person, on subsequent trial of a suit *in rem* by the United States, where, as against him, the existence of the same act or fact is the matter in issue, as a cause for the forfeiture of the property prosecuted in such suit *in rem*. It is urged as a reason for not allowing such effect to the judgment, that the acquittal in the criminal case may have taken place because of the rule requiring guilt to be proved beyond a reasonable doubt; and that, on the same evidence, on the question of preponderance of proof, there might be a verdict for the United States, in the suit *in rem*. Nevertheless, the fact or act has been put in issue and determined against the United States; and all that is imposed by the statute, as a consequence of guilt, is a punishment therefor. There could be no new trial of the criminal prosecution after the acquittal in it; and a subsequent trial of the civil suit amounts to substantially the same thing,

with a difference only in the consequences following a judgment adverse to the claimant.

Coffey was acquitted on a charge of operating a still without paying the necessary tax thereon and could raise this acquittal as a bar to action for forfeiture of the distilling equipment. Mulcahey was acquitted on a charge of being engaged in the business of dealing in firearms without a license and can raise this acquittal as a bar to the present forfeiture action involving the 89 firearms, since a jury has already found that these 89 firearms were not being used by Mulcahey in the business of dealing in firearms without a license.

The government argues that the present action is controlled by *One Lot Emerald Cut Stones and One Ring* v. *United States*, 409 U.S. 232 (1972), in which the court held that forfeiture of the ring and stones was not barred by the owner's acquittal on charges of violating 18 U.S.C. § 545 which covers willfully and knowingly, with intent to defraud the United States, smuggling articles into the United States without submitting the same to required customs procedures. The court found that the second action was not barred because the essential elements of proof in the two actions were not the same. In the criminal action it was necessary to prove a knowing and willful intent to defraud the United States, which was not required in the forfeiture. The court was careful to point out that if the elements of proof were the same then the government would be barred. At page 234 the court stated:

> Collateral estoppel would bar a forfeiture under § 1497 if, in the earlier criminal proceeding, the elements of a § 1497 forfeiture had been resolved

against the government. *Ashe* v. *Swenson*, 397 U.S. 436, 443 (1970).

In Mulcahey's criminal proceeding the elements of the present forfeiture were all resolved against the government, so the present action is barred by collateral estoppel.

One Lot Emerald Cut Stones did not overrule *Coffey*. The court in *One Lot Emerald Cut Stones*, at footnote 5 distinguished the two cases as follows:

> The difference in the issues involved in the criminal proceeding, on the one hand, and the forfeiture action, on the other, serves to distinguish *Coffey* v. *United States*, 116 U.S. 436 (1886), relied upon by the District Court in the present case. *Coffey* involved a forfeiture action commenced after an acquittal. This Court noted, in holding the forfeiture barred, that "[t]he information [for forefeiture] is founded on §§ 3257, 3450 and 3453; and there is no question, on the averments in the answer, that the fraudulent acts and attempts and intents to defraud, alleged in the prior criminal information, and covered by the verdict and judgment of acquittal, embraced all of the acts, attempts and intents averred in the information in this suit." *Id.* at 442. The Court specifically distinguished the situation where "a certain intent must be proved to support the indictment, which need not be proved to support the civil action." *Id.* at 443. See also *Stone* v. *United States*, 167 U.S. 178 (1897).

The present case is not controlled by *One Lot Emerald Cut Stones*. The stones which were the subject of the forfeiture in that case became contraband and subject to seizure once they came into the United States

without payment of the required duty. The criminal action for alleged smuggling of these stones proved only that the holder of the stones did not knowingly with the intent to defraud the United States smuggle the articles into the country. Intent to defraud was not an issue in the later forfeiture proceeding and did not need to be proved, because the stones were admittedly in the United States without being subjected to required customs proceedings and as a result were contraband, subject to seizure. Firearms are not contraband and are not subject to seizure unless they are used or intended to be used in violation of the Gun Control Act. This issue of whether the firearms were used or intended to be used in violation of the Act was tried in No. 77-00013 and conclusively decided. The government now wishes to relitigate the same issue hoping for a different result.

To support a conviction under 18 U.S.C. § 922(a) the government must prove two essential elements: First, that the defendant, between the dates specified in the indictment, engaged in the business of dealing in firearms (or ammunition); and second, that at the time he engaged in that business he was not a licensed importer, licensed manufacturer, or licensed dealer in firearms. 2 Devitt and Blackmar, *Federal Jury Practice and Instructions* § 59.10.

The same two essential elements must be proved in the forfeiture action. The same firearms that were introduced into evidence in the criminal action are the subject of the forfeiture action. The United States had its day in court on these identical issues in the criminal proceeding and is collaterally estopped by the verdict in that case from pursuing the matter in this forfeiture action.

Title 18, U.S.C. § 924(d) states:

> Any firearm or ammunition *involved in or used or intended to be used* in the violation of any of the provisions of this chapter or any rule or regulation promulgated thereunder, or any violation of any other criminal law of the United States, shall be subject to seizure and forfeiture . . . . (Emphasis added)

The criminal verdict conclusively decided that the firearms in question were not "involved in or used or intended to be used in the violations of any provision of this chapter."

The government, in addition to *One Lot Emerald Cut Stones*, relies upon *Glup* v. *United States*, 523 F.2d 557 (8th Cir. 1975), *Epps* v. *Bureau of Alcohol, Tobacco, and Firearms*, 357 F.Supp. 345 (E.D. Tenn. 1973) and *United States* v. *One (1) 1969 Buick Riviera Automobile*, 493 F.2d 553 (5th Cir. 1974). This reliance is misplaced. In *Glup* the firearms were seized on June 8, 1970 and declared forfeited on August 11, 1970, because Glup had taken no action to contest the seizure and forfeiture. Two years later Glup was indicted on three counts charging violation of 18 U.S.C. § 922(a) and three counts charging him with violation of 18 U.S.C. App. § 1202. The forfeited firearms were used in evidence at the trial on these charges, but none of the six counts involved firearms included in the June 8, 1977 seizure. Glup was acquitted on all six counts by a jury. In *Glup* the forfeiture preceded the criminal acquittal, and the charges contained in the indictment did not involve the firearms which had been declared forfeited.

In *Epps* the plaintiff was seeking return of certain firearms and ammunition which had been seized and

used against him in a criminal proceeding based upon 18 U.S.C. § 922(a), but the court did not mention the United States Supreme Court decision of *Coffey* v. *U.S.*, which was still good law as evidenced by footnote 5 in *One Lot Emerald Cut Stones*, a case decided in 1972, the year prior to the *Epps* decision.

In *One (1) 1969 Buick Riviera Automobile*, the individual was charged with importing marijuana, but the criminal charges were dismissed prior to trial, and the Fifth Circuit was careful to point out that no issue had been actually litigated by the dismissal of the prior criminal charge and, therefore, *Coffey* did not apply.

The government argues that this forfeiture is a civil proceeding and as such is not barred by the jury verdict in the criminal case. The present forfeiture is criminal in nature and the prior jury verdict is a bar to the present proceeding.

In *Boyd* v. *United States*, 116 U.S. 116 (1885) (decided in the same term as *Coffey*) the court concluded:

> We are also clearly of the opinion that proceedings instituted for the purpose of declaring a forfeiture of a man's property by reason of offenses committed by him, though they may be civil in form, are in their nature criminal. Page 633, 634.

The present forfeiture is for offenses allegedly committed by Mulcahey, who has been found innocent of these charges.

The forfeiture provision set forth in § 924(d) is a part of the "Penalties" section of the law. Everything in § 924 provides a penalty, be it fine, prison or forfeiture, for the violation of a provision of the Gun

Control Act. The forfeiture provision is merely a way of disposing of the firearms which have been used in violation of the Act, after there is a conviction of such violation. Forfeiture is a penalty suffered by a defendant in addition to a fine and/or imprisonment. If Mulcahey had been convicted, he could have been fined and/or imprisoned and would have lost all of his firearms under § 924(d). But he was acquitted on the charge of being a gun dealer without a license. However, the government still wishes to invoke the penalty of § 924(d). Mulcahey would thereby be subject to the same penalty of losing his property for an activity for which he had been found not guilty.

Helvering v. *Mitchell*, 303 U.S. 391 (1938) is not controlling. It involved assessment of a penalty for tax fraud after acquittal of a charge of willful evasion. The court held, at 399, that the question was one of statutory construction, that is whether Congress intended to punish criminals twice for the same offense. The court went on to find that the civil fraud penalty was remedial in character and was ". . . provided primarily as a safeguard for protection of the revenue and to reimburse the Government for the heavy expense of investigation and loss resulting from the taxpayer's fraud." *Id.* at 401.

There is nothing remedial about forfeiture under § 924(d). The firearms do not go into the public treasury to offset the expense of operating the ATF. These firearms are destroyed.

Marcus v. *Hess*, 317 U.S. 537 (1943) involved a claim of defrauding the United States through a device of collusive bidding on P.W.A. projects in the Pittsburg area. The defendants were indicted for defrauding the government and upon a plea of nolo contendere were fined $54,000. Thereafter the pres-

ent action was brought under a qui tam statute which allowed a suit to be brought by an informer in the name of the United States. The informer would receive half of the amount of the recovery, which recovery would include double the amount of damages sustained and the sum of $2,000 for each violation. *Marcus* is not applicable because the defendant pled guilty and was not acquitted. Also, the $2,000 added to the double damages is simply a way of establishing damages in a civil action, similar to treble damages under the antitrust law, and does not represent a second fine.

Rex Trailer Co. v. *United States*, 350 U.S. 148 (1955) also involved a defendant who had pled nolo contendere to a five count indictment of fraudulently purchasing motor vehicles from the United States under the Surplus Property Act of 1944. He was fined $25,000 in criminal court and objected on the grounds of double jeopardy to a civil penalty under the Act which provided that every person engaged in any fraudulent trick or scheme to obtain property from the United States should pay the United States the sum of $2,000 for each act and double the amount of any damage to the United States. Section 26 of the Surplus Property Act, 58 Stat. 765, 780, 50 U.S.C. App. (1946 ed.) § 1635(d) provided: "The civil remedies provided in this section shall be in addition to all other criminal penalties and civil remedies provided by law."

Obviously Congress intended for there to be a criminal and a civil remedy for violating the Surplus Property Act. There is no such intent evidenced by Congress for a violation of the Gun Control Act. The forfeiture provision is contained in the same section with the criminal penalties.

There are no civil remedies contained in § 924, or anywhere else in the Gun Control Act.

For the reasons set forth above, the court concludes that the acquittal in the prior criminal action involving the identical facts and essential elements is a bar to the present forfeiture proceeding. Therefore, the judgment of the district court is

REVERSED.

WINTER, Chief Judge, with whom BUTZNER, RUSSELL, and MURNAGHAN join, dissenting:

We respectfully dissent for the reasons set forth in the dissent to the panel opinion, United States v. One Assortment of 89 Firearms, 669 F.2d 206, 210-13 (4 Cir. 1982), and the additional reasons which follow.

In oral argument before us, counsel for Mulcahey conceded that he asserted entrapment as a defense in his trial for violation of 18 U.S.C. § 922(a)(1), and that defense was submitted to the jury. Of course, in returning a verdict of not guilty, the jury did not specify the grounds of acquittal, but it is equally possible that the jury found that Mulcahey was engaged in the business of dealing in firearms without a license, but had been entrapped into committing an illegal sale, as found that Mulcahey was not so engaged. Thus in our view, the majority errs when it confidently asserts that the jury verdict in the criminal action conclusively settled the issue that Mulcahey was not engaged in the business of dealing in firearms without a license.

But irrespective of the factual issue of Mulcahey's guilt or innocence, we remain convinced that the forfeiture provisions of 18 U.S.C. § 924(d) are civil in nature so that *any* determination in the criminal prosecution is irrelevant to a decision of forfeiture. Our conclusion is reinforced by the language of that subsection. It states disjunctively that "[a]ny firearm involved in or used or *intended to be used* in, any violation of this chapter . . . shall be subject to seizure and forfeiture . . ." (emphasis added). *Id.* Nothing in the provision of § 922 under which Mulcahey was prosecuted renders an *intention* to engage in the business of dealing in firearms without a li-

cense illegal.* Only the completed act of engaging in the prohibited business is rendered unlawful. It is at once apparent that the forfeiture provisions of the Act were intended by Congress to be broader in scope than the criminal sanctions. This is persuasive evidence that Congress did not intend forfeitures to be an additional penalty for the commission of a criminal act but rather that they be a separate civil sanction, remedial in nature.

We would affirm the judgment of the district court.

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* While the majority asserts that the "issue of whether the firearms were used or *intended to be used* in violation of the Act was tried . . . and conclusively decided" (emphasis added) in the earlier criminal case, the emphasized portion of that statement lacks record support. Mulcahey was indicted and acquitted for a violation of 18 U.S.C. § 922(a)(1) which provides:

> (a) It shall be unlawful—
>
> (1) for any person, except a licensed importer, licensed manufacturer, or licensed dealer, to engage in the business of importing, manufacturing, or dealing in firearms or ammunition, or in the course of such business to ship, transport, or receive any firearm or ammunition in interstate or foreign commerce.

Manifestly the question of whether Mulcahey intended to use the firearms he possessed in violation of the statute was neither an issue nor was it decided in his criminal trial.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 81-1055

UNITED STATES OF AMERICA, APPELLEE

v.

ONE ASSORTMENT OF 89 FIREARMS, APPELLANT

NATIONAL RIFLE ASSOCIATION OF AMERICA, AMICUS CURIAE

Appeal from the United States District Court for the District of South Carolina, at Columbia. Charles E. Simons, Jr., District Judge

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Argued: November 3, 1981 Decided: January 26, 1982

Before WINTER, Chief Judge, FIELD, Senior Circuit Judge and CHAPMAN, Circuit Judge.

CHAPMAN, Circuit Judge

An action for forfeiture was brought by the United States of America against 89 (originally 92) firearms it seized under a search warrant of the premises of Patrick M. Mulcahey. Paragraph 6 of the complaint seeking forfeiture alleges:

> That said firearms were had and possessed and used and intended to be used on January 20, 1977, and prior thereto by Patrick M. Mulcahey in Richland County, South Carolina, in violation of the laws of the United States by engaging in the business of a dealer in firearms and ammunition without the said Patrick M. Mulcahey having first applied for and received a license as a dealer in firearms and ammunition as required by 18 U.S.C. 923(a); and said firearms having been used and intended to be used and involved in said unlicensed firearms business in violation of 18 U.S.C. 922(a)(1) and 923(a), thereby became forfeited to the United States under the provisions of 18 U.S.C. 924(d).

The same 89 firearms were introduced as exhibits in Criminal Action 77-00013 brought in the United States District Court for the District of South Carolina by the United States of America against Patrick M. Mulcahey under an indictment charging that he unlawfully and knowingly engaged in the business of dealing in firearms without being licensed in violation of 18 U.S.C. § 922(a)(1) and § 924(a). The criminal case was tried before a jury and resulted in a not guilty verdict on March 16, 1977.

This not guilty criminal verdict was raised as a defense in the forfeiture action, but upon motion of the United States the defense was stricken from defendant's answer. The forfeiture action was then tried without a jury, and the Court concluded:

> . . . [T]he firearms here in question were involved in, used or intended to be used in violation of 18 U.S.C. § 922(a)(1). Such firearms are rendered subject to forfeiture under 18 U.S.C. § 924(d), which forfeiture is hereby ordered.

In connection with this conclusion, the Court found that these firearms were used by Patrick M. Mulcahey from May 13, 1976, to January 20, 1977, while Mulcahey was engaged in the business of dealing in firearms without being properly licensed. The criminal indictment against Mulcahey charged him with being engaged in the business of dealing in firearms without being licensed to do so from on or about May 12, 1976, up to the return of the indictment on January 19, 1977.

Mulcahey, the claimant in the present action, seeks return of the 89 firearms upon the ground that the jury verdict in the criminal action conclusively settled the issue that he was not engaged in the business of dealing in firearms without a license, so the firearms could not have been used by him while engaged in such a business without a license.

Mulcahey contends that the present action is barred by the holding in *Coffey* v. *U.S.*, 116 U.S 436, 6 S. Ct. 437, 29 L.Ed. 684 (1886). We agree.

Coffey was tried on a criminal charge of violating the revenue laws of the United States by operating a distillery without payment of the required taxes. He was acquitted on this charge, and shortly thereafter the United States sought forfeiture of the distilling equipment. Coffey raised the prior acquittal as a bar to the forfeiture action and the Supreme Court agreed stating at page 442:

> The principal question is as to the effect of the indictment, trial, verdict and judgment of acquittal set up in the fourth paragraph of the answer. The information is founded on sections 3257, 3450 and 3453; and there is no question, on the averments in the answer, that the fraudulent acts and attempts and intents to defraud, alleged

in the prior criminal information, and covered by the verdict and judgment of acquittal, embraced all of the acts, attempts and intents averred in the information in this suit.

The question, therefore, is distinctly presented, whether such judgment of acquittal is a bar to this suit. We are of opinion that it is.

At 443 the Court stated:

Yet, where an issue raised as to the existence of the act or fact denounced has been tried in a criminal proceeding, instituted by the United States, and a judgment of acquittal has been rendered in favor of a particular person, that judgment is conclusive in favor of such person, on subsequent trial of a suit *in rem* by the United States, where, as against him, the existence of the same act or fact is the matter in issue, as a cause for the forfeiture of the property prosecuted in such suit *in rem*. It is urged as a reason for not allowing such effect to the judgment, that the acquittal in the criminal case may have taken place because of the rule requiring guilt to be proved beyond a reasonable doubt; and that, on the same evidence, on the question of preponderance of proof, there might be a verdict for the United States, in the suit *in rem*. Nevertheless, the fact or act has been put in issue and determined against the United States; and all that is imposed by the statute, as a consequence of guilt, is a punishment therefor. There could be no new trial of the criminal prosecution after the acquittal in it; and a subsequent trial of the civil suit amounts to substantially the same thing, with a difference only in the consequences following a judgment adverse to the claimant.

Coffey was acquitted on a charge of operating a still without paying the necessary tax thereon and could raise this acquittal as a bar to an action for forfeiture of the distilling equipment. Mulcahey was acquitted on a charge of being engaged in the business of dealing in firearms without a license and can raise this acquittal as a bar to the present forfeiture action involving the 89 firearms, since a jury has already found that these 89 firearms were not being used by Mulcahey in the business of dealing in firearms without a license.

The government argues that the present action is controlled by *One Lot Emerald Cut Stones and One Ring* v. *United States*, 409 U.S. 232 (1972), in which the Court held that forfeiture of the ring and stones was not barred by the owner's acquittal on charges of violating 18 U.S.C. §545 which covers willfully and knowingly, with intent to defraud the United States, smuggling articles into the United States without submitting the same to required customs procedures. The Court found that the second action was not barred because the essential elements of proof in the two actions were not the same. In the criminal action it was necessary to prove a knowing and willful intent to defraud the United States, which was not required in the forfeiture. The Court was careful to point out that if the elements of proof were the same then the government would be barred. At page 234 the Court stated:

> Collateral estoppel would bar a forfeiture under § 1497 if, in the earlier criminal proceeding, the elements of a § 1497 forfeiture had been resolved against the government. *Ashe* v. *Swenson*, 397 U.S. 436, 443 (1970).

In Mulcahey's criminal proceeding the elements of the present forfeiture were all resolved against the government, so the present action is barred by collateral estoppel.

One Lot Emerald Cut Stones did not overrule *Coffey*. The One in *One Lot Emerald Cut Stones*, at footnote 5 distinguished the two cases as follows:

> The difference in the issues involved in the criminal proceeding, on the one hand, and the forfeiture action, on the other, serves to distinguish *Coffey* v. *United States*, 116 U.S. 436 (1886), relied upon by the District Court in the present case. *Coffey* involved a forfeiture action commenced after an acquittal. This Court noted, in holding the forfeiture barred, that "[t]he information [for forfeiture] is founded on §§ 3257, 3450 and 3453; and there is no question, on the averments in the answer, that the fraudulent acts and attempts and intents to defraud, alleged in the prior criminal information, and covered by the verdict and judgment of acquittal, embraced all of the acts, attempts and intents averred in the information in this suit." *Id.*, at 442. The Court specifically distinguished the situation where "a certain intent must be proved to support the indictment, which need not be proved to support the civil action." *Id.*, at 443. See also *Stone* v. *United States*, 167 U.S. 178 (1897).

To support a conviction under 18 U.S.C. § 922(a) the government must prove two essential elements: First: that the defendant, between the dates specified in the indictment, engaged in the business of dealing in firearms (or ammunition); and second: that at the time he engaged in that business he was not a

licensed importer, licensed manufacturer, or licensed dealer in firerms. 2 Devitt and Blackmar, *Federal Jury Practice and Instructions* § 59.10.

The same two essential elements must be proved in the forfeiture action. The same firearms that were introduced into evidence in the criminal action are the subject of the forfeiture action. The United States had its day in court on these identical issues in the criminal proceeding and is collaterally estopped by the verdict in that case from pursuing the matter in this forfeiture action.

Title 18, U.S.C. § 924(d) states:

> Any firearm or ammunition *involved in or used or intended to be used* in the violation of any of the provisions of this chapter or any rule or regulation promulgated thereunder, or any violation of any other criminal law of the United States, shall be subject to seizure and forfeiture . . . (Emphasis added)

The criminal verdict conclusively decided that the firearms in question were not "involved in or used or intended to be used in the violations of any provision of this chapter."

The government, in addition to *One Lot Emerald Cut Stones*, relies upon *Gulp* v. *United States*, 523 F.2d 557 (8th Cir. 1975), *Epps* v. *Bureau of Alcohol, Tobacco, and Firearms*, 357 F.Supp. 345 (E.D. Tenn. 1973) and *United States* v. *One (1) 1969 Buick Riviera Automobile*, 493 F.2d 533 (5th Cir. 1974). This reliance is misplaced. In *Gulp* the firearms were seized on June 8, 1970 and declared forfeited on August 11, 1970, because Gulp had taken no action to contest the seizure and forfeiture. Two years later Gulp was indicted on three counts charging violation

of 18 U.S.C. § 922(a) and three counts charging him with violation of 18 U.S.C. App. § 1202. The forfeited firearms were used in evidence at the trial on these charges, but none of the six counts involved firearms included in the June 8, 1977 seizure. Gulp was acquitted on all six counts by a jury. In *Gulp* the forfeiture preceded the criminal acquittal and the charges contained in the indictment did not involve the firearms which had been declared forfeited.

In *Epps* the plaintiff was seeking return of certain firearms and ammunition which had been seized and used against him in a criminal proceeding based upon 18 U.S.C. § 922(a), but the Court did not mention the United States Supreme Court decision of *Coffey* v. *U.S.*, which was still good law as evidenced by footnote 5 in *One Lot Emerald Cut Stones*, a case decided in 1972, the year prior to the *Epps* decision.

In *One (1) 1969 Buick Riviera Automobile*, the individual was charged with importing marijuana, but the criminal charges were dismissed prior to trial, and the Fifth Circuit was careful to point out that no issue had been actually litigated by the dismissal of the prior criminal charge and, therefore, *Coffey* did not apply.

For the reasons set forth above, the Court concludes that the acquittal in the prior criminal action involving the identical facts and essential elements is a bar to the present forfeiture proceeding. Therefore, the judgment of the district court is

REVERSED.

WINTER, Chief Judge, dissenting:

In this appeal, the claimant contends that the forfeiture is barred by his acquittal on the earlier criminal charges. This conclusion is required, he asserts, by both the double jeopardy clause and the doctrine of res judicata because the forfeiture is criminal in nature. Even if the forfeiture is deemed to be civil in nature, he continues, it is barred by the doctrine of collateral estoppel. Based upon its reading of coffey v. United States, 116 U.S. 436 (1886), the majority holds that the forfeiture is barred. I concede that *Coffey* hold that a subsequent *criminal* forfeiture is barred by an earlier acquittal on criminal charges arising out of the same facts and that this aspect of *Coffey* is viable today. I think, however, that more recent Supreme Court decisions compel the conclusion that the forfeiture in the present case is civil and that the doctrine of collateral estoppel is inapplicable because the standards of proof in criminal and civil proceedings are different. I therefore respectfully dissent.

I.

In a pair of early cases, the Supreme Court held that nominally civil penalty proceedings brought subsequent to criminal proceedings based on the same allegations were barred by the double jeopardy clause. *See* United States v. Ulrici, 102 U.S. 612 (1881); United States v. Chouteau, 102 U.S. 603 (1881). And in *Coffey*, the Supreme Court ignored the double jeopardy argument but nonetheless held that a subsequent forfeiture proceeding was barred, relying upon some nonconstitutional doctrine of preclusion. From a reading of *Coffey*, one cannot be certain whether or not the Court deemed the forfeiture proceeding to be criminal in nature, and thus whether

the decision was based on res judicata (if so) or on collateral estoppel (if not). *See* 1B J. Moore & T. Currier, *Moore's Federal Practice* ¶ 418[3], at 2855 & n.13 (2d ed. 1980).

It is commonly asserted that a criminal acquittal cannot collaterally estop a contrary finding on ony issues in a later civil proceeding because of the differing standards of proof involved. *See, e.g.*, 18 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 4474, at 757 (1981). Logically, the fact that X was not shown beyond a reasonable doubt does not rule out the possibility that X can be shown by a preponderance of the evidence. To the extent that the *Coffey* decision rested on collateral estoppel (*i.e.*, to the extent that the Court held that the forfeiture proceeding was barred even if civil in nature), the Court was rejecting this standard of proof argument.

Subsequent Supreme Court cases, however, interpreted *Coffey* as being based on a belief that the forfeiture there at issue—a forfeiture of illegal liquor—was criminal in nature. *See* Helvering v. Mitchell, 303 U.S. 391, 405-06 (1938); Murphy v. United States, 272 U.S. 630, 631-32 (1926); Stone v. United States, 167 U.S. 178, 186-87 (1897). And in all three of these cases, the Court very clearly indicated that if the forfeiture proceeding is civil in nature, the standard of proof argument, by itself, is enough to defeat any resort to collateral estoppel. *See* Helvering v. Mitchell, *supra*, 303 U.S. at 397 (using "res judicata" in the broad sense, encompassing collateral estoppel); Murphy v. United States, *supra*, 272 U.S. at 632-33; Stone v. United States, *supra*, 167 U.S. at 188. Indeed, the rejection of the collateral estoppel argument was so complete that the petitioners in United States *ex rel.* Marcus v. Hess, 317 U.S. 537 (1943), and Rex Trailer Co. v. United States, 350 U.S. 148 (1956),

did not even press it, confining themselves instead to arguing that the subsequent proceeding was criminal in nature. The collateral estoppel argument *was* raised in One Lot Emerald Cut Stones v. United States, 409 U.S. 232 (1972), but the Court rejected it on two alternative grounds. First, the Court stated that the criminal proceeding involved an issue of intent not present in the forfeiture proceeding. *Id.* at 234-35. Second, and more important for our purposes, the Court stated that the difference in the standards of proof in the two proceedings precluded application of the doctrine of collateral estoppel. *Id.* at 235.

Thus, it can be said today that "[p]roblems arise only when it is asserted that a nominally civil action brought by the government involves an element of punishment that runs afoul of double jeopardy principles." 18 C. Wright, A Miller & E. Cooper, *supra*, § 4474, at 749. Every time the Supreme Court has faced this double jeopardy question since *Coffey*, it has deemed the later proceeding to be civil in nature and thus upheld the forfeiture or penalty. *See* One Lot Emerald Cut Stones v. United States, *supra*, 409 U.S. at 235-37; Rex Trailer Co. v. United States, *supra*, 350 U.S. at 151-52; United States *ex rel.* Marcus. v. Hess, *supra*, 317 U.S. at 548-52; Helvering v. Mitchell, *supra*, 303 U.S. at 398-405; Murphy v. United States, *supra*, 272 U.S. at 631-32; Stone v. United States, *supra*, 167 U.S. at 187-88. The same result has been reached in the clear majority of lower court decisions addressing the question. *See* cases cited in 1B J. Moore & T. Currier, *supra*, ¶ 418[3] (2d ed. 1980 & 1980-81 Cum. Supp.).[1]

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[1] *Coffey* has never, however, been overruled. Though *Coffey* has been sharply criticized, *see* cases cited in 1B J. Moore & T. Currier, *supra*, ¶ 418[3], at 2854 n.12 (2d ed. 1980), an

Marcus is a good example of the Supreme Court's handling of the question. There, the Court held that a penalty proceeding for defrauding the government by collusive bidding did not violate the guarantee against double jeopardy even though the defendants had been charged and convicted for a crime based on the same allegations. Relying upon the general principles discussed in *Mitchell*, which held that Congress may impose both a criminal and civil sanction in respect to the same act or omission, the Court said that the issue in each case was a statutory one—was the forfeiture or penalty criminal or remedial? The penalty in *Marcus* was held to be civil—and therefore constitutionally permissible—because its purpose was to reimburse the government for monies of which it had been defrauded.

One Lot developed this concept further. In that case an acquitted smuggler contended that a nominally civil proceeding brought for the forfeiture of the allegedly smuggled goods was actually criminal, and thus prohibited by the double jeopardy clause. The Court held that it was not a violation of the double jeopardy clause to punish a wrongdoer both criminally and civilly, and that the forfeiture was a civil proceeding because its purpose was to aid in the enforcement of tariff regulations by preventing smuggled merchandise from circulating in the United States.

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occasional lower court decision follows it, deems a nominally civil forfeiture or penalty proceeding to be criminal in nature, and deems the forfeiture or penalty proceeding to be barred because a criminal proceeding had previously been brought, *see* cases cited in *id.* ¶ 418[3], at 2851 n.1, 2856 n.16 (2d ed. 1980 & 1980-81 Cum. Supp.). Most of these cases, like *Coffey*, dealt with illegal liquor.

III.

One Lot, in my view, is controlling here. The forfeiture statute here, 18 U.S.C. § 924(d), was manifestly designed to aid in the enforcement of gun control laws by preventing the circulation of firearms which had been illegally obtained. *One Lot* thus compels the conclusion that the forfeiture at issue here is civil in nature,[2] so that the double jeopardy and res judicata claims must be rejected. It matters not, despite the majority's views, that the necessary allegations in the criminal proceeding and the forfeiture proceeding were identical. *One Lot* also compels the conclusion that the difference in the standards of proof in the two proceedings obviates the collateral estoppel claim.[3]

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[2] Many cases have held that the preponderance-of-the-evidence standard applies in § 924(d) forfeitures because they are civil in nature. *See, e.g.*, United States v. Eighty-Six Firearms, 623 F.2d 643 (10 Cir. 1980); United States v. 1,922 Assorted Firearms, 330 F. Supp. 635 (E.D. Mo. 1971); United States v. One Assortment of 12 Rifles, 313 F. Supp. 641 (N.D. Fla. 1970).

[3] This is the point on which the majority and I differ. The majority relies on the statement in *One Lot* that: "Collateral estoppel would bar a forfeiture under § 1497 if, in the earlier criminal proceeding, the elements of a § 1497 forfeiture had been resolved against the Government." 409 U.S. at 234 (citation omitted). The majority also relies on a footnote in *One Lot* in which the Court distinguished *Coffey* on the ground that the criminal proceeding and the forfeiture there involved identical allegations, rather than on the ground that the forfeiture there was criminal in nature. *See id.* at 235 n.5. Viewed in isolation, these two snippets support the majority. But they cannot be read in a vacuum. In the course of the same discussion, the *One Lot* Court advanced the standard of proof argument as an independent ground for rejecting the invocation of collateral estoppel. *See id.* at 235. Moreover, if the *One Lot* Court rejected the standard

The two courts that have addressed the precise question presented in this case have stated that the § 924(d) forfeiture proceeding is not barred. *See* Glup v. United States, 523 F.2d 557 (8 Cir. 1975) (dictum); Epps v. Bureau of Alcohol, Tobacco and Firearms, 375 F. Supp. (S.D. Tenn. 1973), *aff'd without opinion*, 495 F.2d 1373 (6 Cir. 1974). The majority attempts to distinguish these two cases. As for *Glup*, the majority points out that there, unlike in the present case, different firearms were involved in the criminal proceeding than were involved in the forfeiture. This observation is correct, and that apparently renders the court's discussion in *Glup* dictum. But, although dictum, the Eighth Circuit explicitly stated that § 924(d) forfeitures are civil in nature, thereby disposing of the double jeopardy and res judicata arguments, and also stated: "Even assuming, *arguendo*, that the criminal trial and the forfeiture involved some of the same firearms, the collateral estoppel doctrine, which is at the core of the appellant's present contention, does not apply." 523 F.2d at 561. Not surprisingly, the reason the court gave for this last conclusion was the difference in the standards of proof involved in the two proceedings. *Id.* As for *Epps*, the majority notes that it fails to mention *Coffey*. But that is of no significance since *Coffey*, as I have already indicated, is inapposite.

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of proof argument, it broke with the explicit reasoning of a half-dozen cases decided by the Supreme Court since *Coffey*. *One Lot* contains not the slightest hint, however, that the Court thought that is what it was doing. The majority declines even to mention *One Lot*'s discussion of standards of proof or a single one of the Supreme Court cases that intervened between *Coffey* and *One Lot*.

IV.

In my view of the case, I am brought finally to claimant's contention that the district court's factual findings should be set aside on appeal. The government argues that the scope of review is limited to a determination of whether the district court abused its discretion. There is a dearth of authority on the question of the scope of review. I would be inclined to hold that the proper scope of review is the "not clearly erroneous" test of Rule 52, Fed. R. Civ. P., but I would find it unnecessary to decide the issue here, because I think that the district court's findings pass either test.

I would affirm the judgment of the district court.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 81-1055

UNITED STATES OF AMERICA, APPELLEE

vs.

ONE ASSORTMENT OF 89 FIREARMS, APPELLANT

NATIONAL RIFLE ASSOCIATION OF AMERICA, AMICUS CURIAE

JUDGMENT

Appeal from the United States District Court for the District of South Carolina

THIS CAUSE came on to be heard on the record and the petition for rehearing, and the said cause was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, upon rehearing, that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed.

Aug. 23, 1982

/s/ William K. Slate, II
Clerk

APPENDIX D

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Civil Action No. 77-590

UNITED STATES OF AMERICA, PLAINTIFF

—versus—

ONE ASSORTMENT OF 89 FIREARMS, DEFENDANT

Dec. 30, 1980

ORDER

This forfeiture action, brought pursuant to 18 U.S.C. § 924(d), comes before the court with a long and somewhat complex history.

The assortment of firearms in question was seized by the Bureau of Alcohol, Tobacco and Firearms on January 20, 1977, from the residence of Patrick M. Mulcahey in Columbia, S.C. Subsequently, Patrick Mulcahey was tried for alleged criminal violations pertaining to such firearms.[1] A jury found Mulcahey not guilty of the charges against him on March 16, 1977.

On March 31, 1977, the plaintiff filed this civil action *in rem* seeking forfeiture to the United States of an assortment of firearms, as identified in an exhibit to the Complaint. The basis for such forfeiture, as alleged in the Complaint, was that: "said firearms

[1] Mulcahey's Indictment alleged violations of 18 U.S.C. §§ 922(a)(1) and 924(a). It charged that, from on or about May 12, 1976 up to the return of the Indictment on January 19, 1977, Mulcahey was engaged in the business of dealing in firearms without being licensed to do so.

were had and possessed and used an intended to be used on January 20, 1977, and prior thereto by Patrick M. Mulcahey in Richland County, South Carolina, in violation of the laws of the United States by engaging in the business of a dealer in firearms and ammunition without the said Patrick M. Mulcahey having first applied for and received a license as a dealer in firearms. . . ." A warrant for arrest and notice was issued April 4, 1977. Patrick M. Mulcahey filed a Claim and Answer on April 14, 1977.

Upon Motion of the Plaintiff, the court ordered amendment of the Complaint on July 6, 1977, and on the same date issued a Warrant for Arrest and Notice thereon. On July 18, 1977, the claimant filed his Claim and Answer to the Amended Complaint. Subsequent to that time, the parties entered into discovery proceedings and as a result thereof have stipulated that the transcript of the aforementioned criminal proceeding, *United States* v. *Mulcahey*, Criminal No. 77-0013 (D.S.C. 1977), would be submitted to the court in lieu of testimony.

By Order dated November 14, 1978, Judge Robert W. Hemphill, to whom this case was assigned initially, granted the plaintiff's Motion to Strike the second and third defenses of the defendant's Answer, and denied the claimant's Motion for Summary Judgment. Pursuant to the parties' stipulations, the case was submitted for decision on the basis of the aforementioned transcript and briefs, all of which have been filed with the court.

From this background, and on the basis of the evidentiary sources presented by the government and the claimant, the court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. The commencement of this action was authorized, sanctioned and directed in accordance with 26 U.S.C. § 7401, as demonstrated by a letter with attachments from James C. Bright, Regional Counsel, Bureau of Alcohol, Tobacco and Firearms, Department of the Treasury, said letter being incorporated into plaintiff's Brief as Appendix II.

2. The claimant, Patrick M. Mulcahey, did not have a Federal firearms dealer's license during the period July 1, 1975 to March 31, 1977, as shown by the certification of the lack of such record in official files by the Supervisor, Firearms Explosives Licensing Section, Regulatory Enforcement, Bureau of Alcohol, Tobacco and Firearms, United States Department of the Treasury for the Southeast Region, Atlanta, Georgia. This certification and attendant documents are incorporated in plaintiff's Brief as Appendix III.

3. On May 13, 1976, the claimant at his residence, 1407 Woodlawn Avenue, Columbia, South Carolina, sold a Ruger .357 Magnum Pistol, Serial Number 150-43012 to undercover Special Agent George D. Ferguson, Jr., and informant Kenneth E. Williford for $130. On this occasion, according to Special Agent Ferguson's report, the claimant possessed and offered for sale three other firearms, to wit: A Colt .38 Special Automatic for $160; a Carbine for $160; a .38 Caliber Rifle. The claimant stated, according to Ferguson's report, that he had 5,000 rounds of .223 caliber ammunition and would take $450 for it. Also, it was stated in the report that Williford was present with a firearm described as an "Enforcer" and Mulcahey offered him $60 plus the carbine for it.

4. On May 19, 1976, at his residence, the claimant sold a Taurus .38 Calriber Pistol, Serial Number 858162 to undercover Special Agent Ferguson and informant Williford for $90. On this occasion, ac-

cording to the agent's report, the claimant possessed and offered for sale four other firearms, to wit: A .38 caliber rifle for $100; a 9 mm automatic nine-shot for $175; a Smith & Wesson .357 Magnum, Model 19 for $215; and a .45 automatic for $175. When asked if he had any more guns for sale, the claimant replied, according to the agent's report, that he did not know exactly what he had on hand and did not know how many he wanted to sell. According to the report, when the claimant again asked about the "Enforcer," informant Kenneth E. Williford stated that it needed repairs. Claimant replied that he would like to take it and fix it.

5. On May 26, 1976, at his residence, the claimant sold a Smith & Wesson 9 mm automatic, Model 39-2, Serial Number A275312 to informant Kenneth E. Williford for $180 in the presence of Special Agent George D. Ferguson, Jr. Prior to making this sale the claimant required Williford to execute a Form 4473 which was later seized at claimant's residence on January 20, 1977. According to the agent's report, at the time of the sale of this firearm, the claimant possessed and offered for sale the following firearms: an Army .45 automatic, a .22 rifle, a carbine, a .357 Smith & Wesson, and a Colt .45 caliber with pearl handles. The claimant said that he would sell Williford more guns. The claimant again said that he would like to have the "Enforcer" and Williford told him that he thought he had it sold.

6. In mid 1976, the claimant purchased a Smith & Wesson .357 revolver, Serial Number 8K15410, from non-licensee, Karl O. Grant, for $150. This weapon was seized on January 20, 1977, from the claimant and is on the list of firearms atatched to the forfeiture Complaint.

7. In the latter part of 1976, the claimant purchased a Smith & Wesson, Model 60, Revolver, .38

caliber, Serial Number R132162 from non-licensee, Randall B. Richardson, for $170. This firearm was seized on January 20, 1977, from the claimant and is on the list of firearms attached to the forfeiture Complaint.

8. On August 21, 1976, the claimant purchased from Thomas O. Lain, d/b/a Lain's Gun Shop, a licensed firearms dealer, two Ruger caliber .223 rifles.

9. On October 5, 1976, the claimant purchased from Thomas O. Lain, d/b/a Lain's Gun Shop, a licensed firearms dealer, three Ruger Mini, Model 14, .223 Caliber Rifles, Serial Numbers 180-53444, 180-50813, and 180-51289. Two of these weapons, 180-53444 and 180-50813, were seized on January 20, 1977, from the claimant and are on the list of firearms attached to the forfeiture Complaint.

10. On December 31, 1976, the claimant purchased from Thomas O. Lain, d/b/a Lain's Gun Shop, a licensed firearms dealer, two firearms, to wit: One Ruger Mini, Model 14, .223 Caliber Rifle, Serial Number 180-49696, and one Smith & Wesson, 9 mm, Model 59, Pistol, Serial Number A345245. These two firearms were seized on January 20, 1977, from the claimant and are on the list of firearms attached to the forfeiture Complaint.

11. On January 13, 1977, the claimant at his residence offered for sale to informer Kenneth Williford and undercover Special Agent R. Jerry Embree two Springfield rifles for $150 each, two S & W Automatic Pistols, and one .357 Revolver. On this occasion, the claimant said everything he had was for sale except one pump shotgun that he was putting a front sight on.[2]

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[2] Agent Embree's contemporaneous interpretation of claimant's comment to mean "everything [they] saw on that

12. On January 20, 1977, Special Agent Robert Holland, assisted by other agents, executed a Federal search warrant on claimant's residence, 1407 Woodlawn Avenue, Columbia, South Carolina, and seized 105 firearms.

13. Thirteen of the 105 firearms seized were determined to have been stolen and were returned to their owners. The 92 remaining firearms were described on the list attached to the original Complaint. One Luger Model 1918, 9 mm automatic pistol, serial number 8914 was added by amendment to the original Complaint. From this total of 93 firearms, four were returned to the claimant's wife pursuant to Judge Robert Hemphill's Order of July 6, 1977. This leaves 89 firearms as the subject of this Order.

14. Of the 89 firearms remaining as the subject of this action, nine are the property of members of the Mulcahey family other than the claimant. As identified at Mulcahey's criminal trial, these firearms and their owners are as follows: Government's exhibits 77 and 78—property of claimant's wife; Government's exhibits 24 and 59—property of claimant's daughters; Government's exhibits 14, 91 and 97—property of claimant's older son; Government's exhibits 39 and 109—property of claimant's younger son.[3]

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occasion [was for sale,]" does not control the court's interpretation of claimant's words. Obviously enough, at the time claimant made the statement, Agent Embree could not have known of the full extent of the firearms inventory claimant possessed. Nor, in interpeting the remark as it was spoken, did Agent Embree have the advantage of the full course of claimant's activity spread before him, as this court does now.

[3] The court regards as insignificant the slight variance between claimant's testimony at trial and his answers to interrogatories concerning the ownership of certain firearms by his wife and children. Such small variance is explicable in

While the firearms owned by members of the Mulcahey family other than the claimant were present in the Mulcahey residence at the time of seizure, there is no evidence that these particular firearms were stored together with the firearms owned by the claimant, that they were offered for sale by the claimant, or that they were otherwise used in any manner in the forfeitable offense.

CONCLUSIONS OF LAW

1. The Government has proved by the preponderance of the evidence that the claimant, Patrick M. Mulcahey, was engaging in the business of dealing in firearms and ammunition without being licensed to do so as required by federal law. It is well established that a forfeiture proceeding under 18 U.S.C. § 924(d) is remedial in nature and is properly characterized a civil proceeding. *Bramble* v. *Richardson*, 498 F.2d 968 (10th Cir. 1974); *United States* v. *One (1) 1969 Buick Riviera Automobile*, 493 F.2d 553, 554 (5th Cir. 1974); *Epps* v. *Bureau of Alcohol, Tobacco & Firearms*, 375 F.Supp. 345, 346 (E.D.Tenn., 1973). Unlike the burden of proof "beyond a reasonable doubt" applicable in criminal cases, the burden of proof applicable in civil proceedings is the preponderance of the evidence standard. *Glup* v. *United States*, 523 F.2d 557 (8th Cir. 1975); *One Lot Emerald Cut Stones* v. *United States*, 409 U.S. 232 (1972); *One 1961 Lincoln Continental Sedan* v. *United States*, 360 F.2d 467 (8th Cir. 1966).

2. Appendix III of plaintiff's Brief, a Certificate of Lack of Official Record of Issuance of Firearms

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light of the large number of firearms involved in the overall matter. The court considers the claimant's trial testimony to be the more reliable.

Dealer's License to Patrick M. Mulcahey, 1407 Woodlawn Avenue, Columbia, South Carolina, for the period July 1, 1975, to March 31, 1977, shows that the claimant had not been issued a license to deal in firearms for the period of July 1, 1975, to March 31, 1977. The claimant *was* at one time licensed to deal in firearms. By his own admission at the criminal proceeding against him, Mulcahey held a federal firearms license from 1966 until sometime in 1975. However, the claimant bought and sold firearms on numerous occasions during the period from July 1975 through March 1977, when no license to deal had been issued to him. Evidence of these transactions clearly establishes that during an eight-month period from May 13, 1976, to January 20, 1977, the claimant did engage in the business of dealing in firearms without being licensed to do so. That this was the case is evidenced by the following summary of these transactions:

(a) seven purchases of firearms on four separate occasions;

(b) three offers to purchase a firearm (the same "Enforcer") on three separate occasions;

(c) three sales of firearms on three separate occasions;

(d) seventeen offers to sell firearms (at least nine different firearms) on four occasions.

In his answers to the plaintiff's interrogatories, the claimant exhibited a marked inability to recall the date he acquired the seized firearms, from whom and how these firearms were acquired, and the purchase price or other thing of value given by the claimant in exchange for each firearm. Of the 91 firearms

listed on the claimant's Answers to plaintiff's interrogatories, the claimant was unable to give any information regarding 53 of these firearms.

The claimant, in his answers to the plaintiff's interrogatories, recalled at least four occasions when he had purchased guns during the period in question; and he recalled the three sales of firearms and one sale of ammunition which occurred in May of 1976.

3. The type of firearms involved in these transactions, as well as most of the firearms seized, were not curios or relics, but of the sort commonly dealt in by licensed dealers. The claimant submitted that many of the guns were in fact curios or relics; but at trial, firearms expert Robert J. Scroggie testified that, at most, fourteen firearms were curios or relics, and only five were positively curious or relics. None of the firearms in question were identified as "antique firearms" within the meaning of 18 U.S.C. § 921(a)(16), so as to remove them from the definition of "firearm" under § 921(a)(3), and thereby from the prohibition of § 922(a)(1).

4. Of the claimant's purchases, three or four were of two or more of the same type firearm. The court considers this to be strong evidence of dealing in firearms, rather than collecting. In particular, of six Ruger Mini 14, .223 caliber rifles purchased by the claimant from August 21, 1976, to December 3, 1976, only three remained among those firearms seized pursuant to the warrant on January 20, 1977.

5. Resale of guns shortly after their purchase is yet another strong indicator of dealing in firearms. At trial, Special Agent Robert Holland testified that he had taken an inventory of the claimant's stock in 1974, during the period when the claimant was a federally licensed firearms dealer. Nineteen of the

firearms in the inventory at trial were present to Holland's inventory to Mr. Mulcahey's stock of 51 firearms in July, 1974.

6. Though proof that an unlicensed person is engaging in the business of dealing in firearms must, of course, be based on the evidence presented in each case, courts have upheld criminal convictions for unlicensed dealing in firearms under factual situations less aggravated than that of the instant case.

The sale of an unspecified number of firearms to a stranger, plus offers to sell firearms to agents, was held to be sufficient evidence to convict in *United States* v. *Apuzzo*, 555 F.2d 306 (2nd Cir. 1977), *cert. denied*, 435 U.S. 916 (1978).

The sale of seven handguns to undercover agents in four separate transactions in early 1970, and seizure of 96 new handguns at the defendant's home was sufficient in *United States* v. *Day*, 476 F.2d 562 (6th Cir. 1973). In the instant case, during the month of May, 1976, three firearms were sold to undercover agents in three separate transactions; twelve firearms were offered for sale to the agents; three offers for purchase of the "Enforcer" were made to the informer, Mr. Williford; and on May 19, 1976, the claimant even offered to repair the Enforcer for Mr. Williford. Furthermore, 105 firearms were seized from the claimant's residence at the time the search warrant was executed.

7. That several sales of firearms occur in a reasonably short space of time is evidence of dealing in firearms. *See United States* v. *Gross*, 451 F.2d 1355 (7th Cir. 1971), which involved the sale of eleven separate weapons in a two-month period; and *United States* v. *Williams*, 502 F.2d 581 (8th Cir. 1974), in which there were five sales of firearms to Government agents in a month's time.

8. A violation of 18 U.S.C. § 922(a)(1) does not require that the Government establish dealing as the equivalent of selling; nor does it require that the Government establish that the person engaged in the business of dealing in firearms make a profit. *United States* v. *Vitale*, 596 F.2d 688 (5th Cir. 1979); *see also United States* v. *Shirling*, 572 F.2d 532 (5th Cir. 1978). One sale to an agent along with the fact that the defendant considered himself to be and held himself out as a dealer was sufficient in *United States* v. *Swinton*, 521 F.2d 1255 (10th Cir. 1975), *cert. denied*, 424 U.S. 918 (1976).

In *United States* v. *Huffman*, 518 F.2d 80 (4th Cir.), *cert. denied*, 423 U.S. 864 (1975), the Fourth Circuit upheld a conviction based upon dealings involving more than a dozen transactions in the course of a few months, including trading large quantities of ammunition for firearms.

9. Crucial to a determination that one is dealing in firearms, is the representation or holding out by the defendant, or in the instant civil contest, by the claimant, that he buys and/or sells firearms and ammunition. In *United States* v. *Micieli*, 594 F.2d 102 (5th Cir. 1979), evidence of the defendant's acquisition of firearms along with the defendant's statement that he sold 10 firearms, was sufficient to establish "dealing in firearms." The only evidence of sale in *Micieli* was the defendant's statement.

In the instant case, the claimant had Mr. Williford execute a firearms Form 4473. This is a firearms disposition record which is presented by the seller to the buyer for him to fill out. It is a standard form which is used by licensed firearms dealers; it serves as protection for the licensed dealer in the event the buyer is a convicted felon or is otherwise restricted

in his ability to purchase firearms. The claimant even asked Mr. Williford for his driver's license number as identification on the form. Furthermore, on January 13, 1977, the claimant in the instant case represented to Mr. Williford and Special Agent R. Jerry Embree that "everything he had was for sale," except for one firearm on which he was working. This statement by the claimant is evidence that at that time he was engaging in the business of a dealer in firearms and had committed for the purpose of, and intended to use in, the said business, all the firearms he possessed, except one. This statement by the claimant also reflects the "willingness to deal" and "greater degree of activity than occasional sales by a hobbyist," suggested in *United States* v. *Huffman*, 518 F.2d 80 (4th Cir.), *cert. denied*, 423 U.S. 864 (1975).

10. In *United States* v. *One Assortment of 12 Rifles and 21 Handguns*, 313 F.Supp. 641 (N.D. Fla. 1970), and *United States* v. *One Assortment of Firearms and Ammunition*, 313 F.Supp. 1056 (E.D. Tenn. 1970), the claimants were engaged in the business of dealing in firearms and ammunition without being licensed to do so, in violation of 18 U.S.C. § 922(a)(1). The facts established that the claimants had been selling firearms, and firearms were displayed for sale. On these facts, the courts ordered forfeiture of the firearms and ammunition.

In the instant case, although the claimant did not display his entire assortment of firearms, he did maintain them all in his residence, from which he also operated an army surplus business. The fact that the claimant kept the entire assortment of firearms so accessible to his surplus showroom, that he repeatedly went into the non-public area of his residence to obtain the firearms he did display to government agents, the claimant's own statements, his course of dealing,

and the wealth of circumstantial evidence in the record prove by a preponderance of the evidence that he used or intended to use all of the firearms he personally possessed as an inventory to be drawn from in the course of dealing in firearms, in violation of 18 U.S.C. § 922(a)(1).

11. Consequently, this court concludes that the Government has proved by a preponderance of the evidence that, with the exception of those firearms labeled in claimant's criminal trial as Government's Exhibits 14, 24, 39, 59, 77, 78, 91, 97 and 109, the firearms here in question were involved in, used or intended to be used in violation of 18 U.S.C. § 922(a)(1). Such firearms are rendered subject to forfeiture under 18 U.S.C. § 924(d), which forfeiture is hereby ordered.

Those firearms identified as Government's Exhibits 14, 24, 39, 59, 77, 78, 91, 97 and 109 shall be returned to their owners as described in the fourteenth finding of fact set out above. These Exhibits are described by type and/or serial number as follows:

(1) Exhibit 14: Iver Johnson, 12 gauge single barrel shotgun, Champion Model, Serial Number—None. (The court notes that claimant described Exhibit 14 as a 16 gauge shotgun, when it apparently is in fact a 12 gauge. *Cf.* Exhibit 44, which is a 16 gauge Iver Johnson shotgun.)

(2) Exhibits 24 and 59: two Remington 22 caliber Mohawk rifles, Serial Nos. 2324414 and 2324420.

(3) Exhibit 39: Winchester 22 caliber Model 290 Rifle with scope, Serial No. 695087.

(4) Exhibit 77: Kurz 9mm backup Model Automatic Pistol, Serial No. A03183.

(5) Exhibit 78: Browning Sport King Model 22 long rifle automatic pistol, Serial No. 10466P69.

(6) Exhibit 91: Ruger carbine 44 magnum automatic rifle with scope, Serial No. 100-20563.

(7) Exhibit 97: Remington Fieldmaster 22 caliber pump rifle, Serial No. 153708.

(8) Exhibit 109; Harrington & Richardson 410 gauge shotgun, Model 158, Serial No. AF 3398.

AND IT IS SO ORDERED.

/s/ Charles E. Simons, Jr.
CHARLES E. SIMONS, JR.
United States District Judge

Aiken, South Carolina
December 26, 1980.

APPENDIX E

UNITED STATES DISTRICT COURT
D. SOUTH CAROLINA
COLUMBIA DIVISION

Civ. A. No. 77-590

UNITED STATES OF AMERICA, PLAINTIFF

v.

ONE ASSORTMENT OF 93 FIREARMS, DEFENDANT

Nov. 14, 1978

Glen E. Craig, Asst. U.S. Atty., Columbia, S.C., for plaintiff.

Herbert W. Louthian, Columbia, S.C., for Patrick M. Mulcahey, owner of property.

ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND PLAINTIFF'S MOTION TO STRIKE

HEMPHILL, District Judge.

This is a forfeiture action, originally filed March 31, 1977, and in which and by which plaintiff seeks condemnation as forfeited to the United States [1], and

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[1] Under provisions of 26 U.S.C. § 7401, which provides: Authorization.

No civil action for the collection or recovery of taxes, or of any fine, penalty, or forfeiture, shall be commenced unless the Secretary or his delegate authorizes or sanctions the proceedings and the Attorney General or his delegate directs that the action be commenced.

a decree for the proper disposal thereof of 92 assorted firearms, as listed in an exhibit to the complaint, on the ground that "said firearms were had and possessed and used and intended to be used on January 20, 1977, and prior thereto by Patrick M. Mulcahey and Richland County, South Carolina, in violation of the laws of the United States by engaging in the business of a dealer in firearms and ammunition without the said Patrick M. Mulcahey having first applied for and received a license as a dealer in firearms * * *". In his answer, filed April 18, 1977, Mulcahey, first claimed ownership of the property described in the complaint and entered a general denial; for a second defense Mulcahey declared that he had been tried on the criminal side of the court, under the provisions of Chapter 44, Title 18, United States Code, in violation of Title 18, United States Code, §§ 922(a)(1) and 924(a) and thereafter acquitted by a verdict of a jury which rendered the issues before the court as *res judicata*, and collaterally estops the government from proceeding. A third defense alleges that the property was seized solely for the purpose of use of said property in evidence in a criminal proceeding and the criminal proceeding having been terminated, that plaintiff had no right to retain or condemn the property.

It is the last two defenses that plaintiff would strike, as positioned in its motion to strike, filed September 20, 1977. On November 9, 1977, defendant moved for summary judgment on the grounds that the owner had been acquitted in the criminal prosecution and that such criminal prosecution bars the forfeiture action. Therefore the motions involve the same issue, to wit: whether the admitted fact that the owner of the firearms was acquitted in a criminal prosecution

foreclosed the forfeiture action as pursued by the government. The complaint verifies the fact that plaintiff accuses Mulcahey of violation of 18 U.S.C. §§ 922(a)(1), 923(a), and 924(d). At the hearing on the motions it was admitted that the verdict in the criminal trial on these charges was not guilty. A recitation or finding of fact is unnecessary as the facts are not in dispute.

Initially, this court finds the complaint is lodged under the forfeiture provisions of 18 U.S.C. § 924(d) which states:

> Penalties.
>
> (d) Any firearm or ammunition involved in or used or intended to be used in, any violation of the provisions of this chapter or any rule or regulation promulgated thereunder, or any violation of any other criminal law of the United States, shall be subject to seizure and forfeiture and all provisions of the Internal Revenue Code of 1954 relating to the seizure, forfeiture, and disposition of firearms, as defined in section 5845(a) of that Code, shall, so far as applicable, extend to seizures and forfeitures under the provisions of this chapter.

It is to be noted that the section is not a criminal statute in term or in effect, but provides a civil penalty —forfeiture—for "any violation of the provisions of this chapter or any rule or regulation promulgated thereunder * * *." Such is the case before the court, a civil pursuit, as countenanced by the statute. A forfeiture proceeding is remedial in nature and is properly characterized as a civil proceeding. *Glup* v. *United States*, 523 F.2d 577, 561 (8th Cir. 1975); *One Lot Stones* v. *United States*, 409 U.S. 232, 237,

93 S.Ct. 489, 493, 34 L.Ed.2d 438, 443 (1972) citing *Helvering* v. *Mitchell*, 303 U.S. 391, 58 S.Ct. 630, 634, 82 L.Ed. 917 (1930).

In *Glup* the Eighth Circuit stated:

> Even assuming, arguendo that the criminal trial and the forfeiture involved some of the same firearms, the collateral estoppel doctrine, which is at the core of appellant's present contention, does not apply. The collateral estoppel effect of an acquittal on a forfeiture proceeding has been most recently addressed by the Supreme Court in *One Lot Emerald Cut Stones* v. *United States*, 409 U.S. 232, 93 S.Ct. 489, 34 L.Ed.2d 438 (1972). In that case, the owner of undeclared imports urged that his acquittal of charges of violating 18 U.S.C. § 545, was a defense to a forfeiture action instituted by the Government under the Tariff Act of 1930, 18 U.S.C. §§ 545, 597. The district court held that the forfeiture was barred by collateral estoppel and the fifth amendment. The Court of Appeals for the Fifth Circuit reversed. The Supreme Court granted certiorari and affirmed. Citing *Ashe* v. *Swenson*, 397 U.S. 436, 443, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970), the Court noted that "[c]ollateral estoppel would bar a forfeiture under § 1497 if, in the earlier criminal proceeding, the elements of a § 1497 forfeiture had been resolved against the Government." 409 U.S. at 234, 93 S.Ct. at 491. ***But the Court observed, acquittal on the criminal charge does not necessarily resolve the issues in the forfeiture action. The difference in the burden of proof in a criminal case and in a civil proceeding precludes application of the collateral estoppel doctrine.*** The Court stated:

> Moreover, the difference in the burden of proof in criminal and civil cases precludes application of the doctrine of collateral estoppel. The acquittal of the criminal charges may have only represented " 'an adjudication that the proof was not sufficient to overcome all reasonable doubt to the guilt of the accused'." As to the issues raised, it does not constitute an adjudication on the preponderance-of-the-evidence burden applicable in civil proceedings.

409 U.S. at 235, 93 S.Ct. at 492 (citations omitted). *It is well established that a forfeiture proceeding under 18 U.S.C. § 924(d) is remedial in nature and is properly characterized as a civil proceeding. Bramble* v. *Richardson*, 498 F.2d 968 (10th Cir. 1974); *United States* v. *One (1) 1969 Buick Riviera Automobile*, 493 F.2d 553, 554 (5th Cir. 1974); *Epps* v. *Bureau of Alcohol, Tobacco & Firearms*, 375 F.Supp. 345, 346 (E.D. Tenn. 1973); *United States* v. *1,922 Assorted Firearms*, 330 F.Supp. 635, 637 (E.D.Mo. 1971). (Emphasis added.) (p. 561.)

The reasoning in *One Lot Stones* is also applicable here:

> If for no other reason, the forfeiture is not barred by the Double Jeopardy Clause of the Fifth Amendment because it involves neither two criminal trials nor two criminal punishments "Congress may impose both a criminal and a civil sanction in respect to the same act or omission * * *" (Citing *Helvering* v. *Mitchell*, supra.)

An examination of the record here shows one criminal case, another civil. The difference in the criminal proceeding on the one hand and the forfeiture

proceeding on the other emphasizes the distinction here. The present action invokes the provisions of 26 U.S.C. § 5872(a)[2] and 26 U.S.C. § 7323(a).[3] The criminal action was not based on, neither included nor involved such sections.

This forfeiture action was properly brought under the provisions of 18 U.S.C. § 924(d) invoking the provisions of 26 U.S.C. § 5872(a) and 26 U.S.C. § 7323(a). This is an action *in rem* commenced by the Complaint for Forfeiture filed on March 31, 1977.[4] The court ordered (April 4, 1977) that Warrant for Arrest and Notice issue. The court obtained jurisdiction over the property by the Marshal arresting it and retaining custody thereof under the direction of the court. There is nothing in such statutes that requires the property be seized under a warrant specifically providing that it is seized for forfeiture.

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[2] 26 U.S.C. § 5872(a) provides: Forfeitures.

(a) Laws applicable.—Any firearm involved in any violation of the provisions of this chapter shall be subject to seizure and forfeiture, and (except as provided in subsection (b)) all the provisions of internal revenue laws relating to searches, seizures, and forfeitures of unstamped articles are extended to and made to apply to the articles taxed under this chapter applies.

[3] 26 U.S.C. § 7323(a) provides: Judicial action to enforce forfeiture.

(a) Nature and venue.—The proceedings to enforce such forfeitures shall be in the nature of a proceeding in rem in the United States District Court for the district where such seizure is made.

[4] By orders dated July 6, 1977, the court ordered that the Complaint be amended to include an additional firearm and that warrant for arrest and notice issue in connection with such additional firearm. On July 18, 1977 Mulcahey filed an Answer to the Amended Complaint.

Where the property is lawfully seized as evidence in a criminal proceeding, it may be made the subject of a forfeiture proceeding under the provisions of 18 U.S.C. § 924(d), 26 U.S.C. §§ 5872(a), and 7323(a). It is clear that a claimant in a forfeiture proceeding is not entitled to the return of the defendant property on the ground he was acquitted in the related criminal proceeding. *Glup*, supra; *United States* v. *One 1969 Buick Riviera Automobile*, 493 F.2d 553 (5th Cir. 1974).

Of interest to this discussion is *Epps* v. *Bureau of Alcohol, Tobacco & Firearms*, 375 F.Supp. 345 (E.D. Tenn. 1973), affirmed without opinion, 495 F.2d 1373 (6th Cir.). There the court stated as follows:

> It is undisputed that the plaintiff did not, at the pertinent times, have a license to engage in the business of dealing in firearms and ammunition; but, he was acquitted of having violated the provisions of 18 U.S.C. § 922(a)(1) on November 7, 1972, in *United States of America, plaintiff* v. *William E. Epps, Jr., defendant*, criminal action no. 7260, this district and division. *Such acquittal on such criminal charge is not a bar to the civil administrative action by the government, which is remedial in nature, arising out of the same facts on which the criminal proceeding was based. Helvering* v. *Mitchell* (1938), 303 U.S. 391, 397, 58 S.Ct. 630, 32 L.Ed. 917, 921 (headnote 2). *Forfeiture of goods is a civil sanction, remedial in nature.* Ibid., 303 U.S. at 400, 82 L.Ed. at 922 (headnote 6); see also *Colavicco* v. *United States*, infra, [2 Cir.] 143 F.2d [410] at 411-412[2]. (Emphasis added.) (p. 346).

It is obvious the second defense is insufficient.

THE THIRD DEFENSE

In paragraph 9 of the complaint Mulcahey alleges that some of the appraised values of the firearms are not accurate and that the appraised total value is approximately one-third of the actual total value. This is not a valid defense.

The general statute (26 U.S.C. § 7323) providing for judicial action to enforce forfeiture does not require any appraisal of seized property. That statute is subject to the exception in 26 U.S.C. § 7325 providing that if the property is valued at $2,500 or less it will be appraised—as the claimant is entitled to judicial enforcement of the forfeiture where the property has a value of $2,500 or less if he files $250 cost bond. The regulations are in accord with the statutes in not applying the appraisement procedure set forth in 26 U.S.C. § 7325 where the property is alleged to have a value of over $2,500. Accordingly, where the property is alleged to have a value of over $2,500, the appraisal is jurisdictional only to the extent that it entitles the claimant to a judicial action without the requirement that he post a cost bond.

Since the Government's appraised value in this case is over $2,500 and is admitted to be so by Mulcahey in his Answer, any defect or inaccuracy in the appraisal is not jurisdictional and is immaterial to the prosecution of the forfeiture action. In other circumstances involving administrative forfeiture proceedings where the property was appraised at $2,500 or less, it has been held that a technical defect in the appraisal was not jurisdictional to the administrative forfeiture proceedings. *Glup*, supra. For an explanation of the reason for the requirements of appraisal and filing of a cost bond by the claimant where the property is valued at $2,500 or less, see *Epps*, supra;

and *Application of Colacicco*, 55 F. Supp. 766 (D.N.Y. 1943) affirmed 143 F.2d 410 (2d Cir. 1944).

In paragraph 10 Mulcahey alleges that many of the alleged items of property were not his property, but the property of his wife, children, and others.[5] This does not allege a valid defense to the forfeiture of any of the property. See *United States* v. *One 1972 Toyota Mark II*, 505 F.2d 1162 (8th Cir. 1974) where the Eighth Circuit stated as follows:

> The innocence, noninvolvement or lack of negligence of the owner in allowing the vehicle to be used for the forfeitable offense is no defense to the forfeiture action. *United States* v. *One 1971 Lincoln Continental Mark III*, 460 F.2d 273, 275 (8th Cir. 1972); *United States* v. *One 1967 Cadillac Coupe Eldorado*, 415 F.2d 647, 648 (9th Cir. 1969); *United States* v. *One 1961 Cadillac*, 337 F.2d 730, 732 (6th Cir. 1964); *cf. Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 94 S.Ct. 2080, 40 L.Ed.2d 452 (1974). (p. 1165)

In paragraph 11 Mulcahey alleges, in effect, that many of the seized items were "curios and relics" and not firearms within the meaning of Chapter 44, Title 18 U.S.C., and that such items should be eliminated from the forfeiture proceeding. This is a misinterpretation of the statutes and does not allege a defense to the forfeiture action.

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[5] By order dated July 6, 1977 the court ordered that four of the firearms be delivered to Mrs. Mulcahey. Government counsel moved for such Order. No one except Mulcahey has filed a claim for any of the defendant firearms as required by the notice published in THE STATE newspaper dated April 29, 1977.

The provisions of 18 U.S.C. § 921(a)(13) and 27 CFR 178.11 defining certain firearms as "curios and relics" make it clear that firearms classified as "curios and relics" are "firearms" as defined in 18 U.S.C. § 921(a)(3)-(8). It is clear that the statute provides for certain firearms to be classified as "curios and relics" in order to create the category of licensee as a collector ((18 U.S.C. § 923(b)) who is a person "who acquires, holds, or disposes of firearms and ammunition as curios and relics" ((18 U.S.C. § 921(a)(13)).

An unlicensed person is not prohibited from collecting firearms generally or of the category of curios or relics. Additionally, an unlicensed person may only buy and sell firearms generally (including "curios and relics") within his own state, with certain exceptions, whereas if licensed as a collector who "acquires, holds, and disposes of firearms as curios and relics" he may acquire "curios and relics" anywhere and dispose of them to any licensee wherever located.

27 C.F.R. 178.41(d) makes it clear that a collector's license applies "only to transactions related to a collector's activity in acquiring, holding, or disposing of curios and relics" and such license does not authorize the collector licensee to acquire and dispose of curios and relics in engaging in the business of a dealer in firearms.

CONCLUSIONS

For the reasons stated above the court concludes that the motion to strike the second and third defenses is granted and that the defense motion for a summary judgment is denied. (The court schedules

a post-decision status hearing November 27, 1978, at 10:00 a.m. o'clock, at Columbia).

The Second and Third Defenses of the Answer are stricken. The Motion for Summary Judgment is denied.

AND IT IS SO ORDERED.

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